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No. 00-____

IN THE
SUPREME COURT OF THE UNITED STATES

SEUNG CHUN LIM, FLUFFY, INC. a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Cross Petitioners

v.

CITY OF LONG BEACH

Cross-Respondent

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

CONDITIONAL CROSS PETITION FOR A WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTIONS PRESENTED

1. May a city adopt an adult zoning ordinance that compels existing adult businesses to relocate instead of applying the ordinance prospectively only to potential new adult businesses?

2. Did the Ninth Circuit Court of Appeals improperly place a portion of the burden of proof upon the adult business operators when it stated,

> "The burden showing that particular sites would not reasonably become available therefore rests with the plaintiffs."?

3. Did the Ninth Circuit err when it stated that properties with restrictive leases banning adult entertainment establishments may nevertheless be considered a part of the actual business real estate market with respect to the question of whether a city has made available sufficient alternative locations for the exercise of First Amendment rights by adult businesses?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

PARTIES TO THE PROCEEDING iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

City of Renton v. Playtime Theaters, Inc.,
475 U.S. 41, 106 S. Ct. 925, 89 L. Ed.
2d 29 (1986).....10

Lim v. City of Long Beach,
12 F. Supp.1050 (C.D. Cal. 1998) 1

Lim v. City of Long Beach,
217 F.3d 1050 (9th Cir. 2000).....1

Young v. American Mini Theaters,
427 U.S. 50, 49 L. Ed. 2d 310, 96
S. Ct. 2440 (1976).....8

Young v. City of Simi Valley,
216 F.3d 807 (9th Cir. 2000).....8

DOCKETED CASES

City of Long Beach v. Lim, et al.,
No.00-814.....1

City of Simi Valley v. Young,
No. 00-701.....1

FEDERAL STATUTES

28 U.S.C. Section 1254(1).....2

PARTIES TO THE PROCEEDINGS

Petitioners

Seung Chun Lim is an individual business owner in Long Beach. Fluffy, Inc. and 5436 Santa Monica Boulevard, Inc., are small California corporations which operate adult businesses in the City of Long Beach.

Respondent

Respondent City of Long Beach is a city in Southern California.

CONDITIONAL CROSS PETITION FOR WRIT OF CERTIORARI

Cross Petitioners Seung Chun Lim, Fluffy, Inc., a California corporation, and 5436 Santa Monica Boulevard, Inc., a California corporation, conditionally Cross Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on June 27, 2000. This Conditional Cross Petition relates to the Petition for Writ of Certiorari filed by the City of Long Beach, City of Long Beach v. Lim, et al., No.00-814 docketed on November 21, 2000.

OPINIONS BELOW

The Ninth Circuit opinion is reported at Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000) and is reproduced as Appendix A in the Petition for Writ of Certiorari filed by the City of Long Beach, No. 00-814. The District Court opinion is reported at Lim v. City of Long Beach, 12 F.Supp.1050 (C.D. Cal. 1998) and is reprinted in Appendix C to the Petition for Writ of Certiorari filed by the City of Long Beach, No.814. Petitioners are dispensing with the reproduction of these opinions pursuant to Rule 12 (5) of the Rules of this Court.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on June 27, 2000. The City of Long Beach filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc, which the Ninth Circuit denied on August 23, 2000. Cross Petitioners also petitioned the

Ninth Circuit for rehearing and their Petition for Rehearing was also denied on August 23, 2000.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1) and Rule 12(5) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The First Amendment to the United States Constitution provides, in part, as follows:

> "Congress shall make no law . . . abridging the freedom of speech. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part, as follows:

> " . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

A lengthier Statement of the Case is set forth by Cross Petitioners herein in their response to the Petition for Writ of Certiorari filed by the City of Long Beach in City of Long Beach v. Lim, et al., No. 00-814. In summary, Cross Petitioners are three adult bookstores and a fourth adult bookstore combined with a mini theater. All four

businesses are currently operating in the City of Long Beach and have been operating for a number of years.

In November of 1994, the City of Long Beach amended its adult zoning code to impose new restrictions on where adult businesses could be located in the City of Long Beach. None of the four businesses operated by Cross Petitioners herein were in compliance with the locational requirements of the 1994 amendment. Moreover a fifth adult business also could not comply. As a result, the City of Long Beach required all of them to relocate or shut down. They were given until May of 1996 to do so.

The City of Long Beach does not require other non conforming uses to relocate. A business under the City's zoning code becomes non conforming when a zoning ordinance is adopted that makes such a business illegal at the particular location in question. Ordinarily a business which becomes illegal by a change to the zoning code is allowed to stay indefinitely. The general rule is that a non conforming use can remain at its current location providing it does not expand or alter its use in any way.

The City essentially treats non conforming adult businesses differently than non conforming non adult businesses. After the ordinance was adopted in 1994, Cross Petitioners herein filed a lawsuit in the U.S. District Court for the Central District of California challenging the constitutionality of the 1994 amendment to the adult zoning code. Among other things, Cross Petitioners alleged that it would violate their First and Fourteenth Amendment rights to have to shut down or relocate because other non

conforming uses were not required to relocate or shut down under applicable provisions of the Long Beach Municipal Code. Thus, Cross Petitioners alleged a denial of equal protection and also, independent of the equal protection clause, a violation of their First Amendment rights to remain where they have been operating for many years.

In addition to the challenge described above, Cross Petitioners also contended that even if they could otherwise be required to move notwithstanding the First and Fourteenth Amendments, there were not sufficient alternative locations to which they could relocate. The District Court initially entered a preliminary injunction to allow the businesses to remain pending trial, but, after trial, concluded that Cross Petitioners had no First or Fourteenth Amendment right to remain where they were located and, in addition, ruled that there were sufficient alternative locations to which they could relocate. The District Court stayed its order dissolving the preliminary injunction for 20 days to give Cross Petitioners the opportunity to seek a further stay from the Ninth Circuit Court of Appeals, which issued a further stay. On appeal, the Ninth Circuit Court of Appeals ruled in part for Cross Petitioners and partly against them.

First, the Ninth Circuit rejected their broad claim that they could not be forced to move at all consistent with the First and Fourteenth Amendments. This Court has <u>never</u> addressed the issue of the application of adult business ordinances to <u>existing</u> businesses as opposed to potential new businesses coming into the City.

On the other issues, the Ninth Circuit generally ruled in favor of Cross Petitioners. With respect to their contention that the burden of proof as to the existence of alternative locations should be on the City, the Ninth Circuit generally ruled for Cross Petitioners on this point, which precipitated a Petition for Writ of Certiorari by the City of Long Beach, No. 814. However, the Ninth Circuit did not go completely in the direction of Cross Petitioners because the Ninth Circuit modified its holding that the City had the burden of proof by stating,

> ". . . The burden of showing that particular sites would not reasonably become available therefore rests with the plaintiffs."

The City has petitioned for Writ of Certiorari on the general issue of which side has the burden of proof since in general the Ninth Circuit ruled for Cross Petitioners - that the City had the burden of proof. However, Cross Petitioners, out of an abundance of caution, are cross petitioning this Court for certiorari on the issue of whether the Ninth Circuit improperly restricted its holding by adding stating that the burden of showing that particular sites would not reasonably become available rested with Cross Petitioners.

Finally, the Ninth Circuit agreed with Cross Petitioners that properties encumbered by long term leases are not part of the relevant real estate market in determining

whether or not the City has fulfilled its constitutional obligation to make available sufficient alternative locations for the operation of adult businesses protected by the First Amendment. On this point the City has petitioned for certiorari contending that properties encumbered by long term leases are nevertheless part of the relevant real estate market. If this Court should grant certiorari on this point, and Cross Petitioners oppose the granting of certiorari, then Cross Petitioners would want his Honorable Court to also consider the question of whether properties occupied by other businesses should be included as part of the relevant real estate market. Also, Cross Petitioners would want this Court to review the issue of whether properties encumbered by restrictive covenants preventing the properties from being used by adult businesses should be considered as part of the relevant real estate market.

REASONS FOR GRANTING THE WRIT

Cross Petitioners have filed this Conditional Cross Petition in response to the City's Petition for Writ of Certiorari. With respect to questions 2 and 3 it was not clear to Cross Petitioners whether questions 2 and 3 presented herein should be "deemed to comprise every subsidiary question fairly included . . ." in the City's petition. Cross Petitioners believe that the issues presented herein should be deemed to comprise subsidiary questions presented by the City's petition. However, Cross Petitioners could not be certain that this Court would agree with Cross Petitioners on these points. Therefore Cross Petitioners were compelled to file this Conditional Cross Petition as a precaution to make sure this Court deals with questions 2 and 3 should the City's petition be granted.

There is no other basis for asking this Court to grant certiorari with respect to questions 2 and 3.

However, with respect to Question 1, Cross Petitioners concede that the question presented is not comprised in any of the questions presented by Petitioner City of Long Beach in No. 814. Cross Petitioners concede that it is a separate issue.

Since they prevailed for the most part in the Ninth Circuit they did not feel the need to separately petition this Court for Writ of Certiorari and acknowledge that this Cross Petition would be untimely if presented as a regular petition. Accordingly, this Court would be technically within its authority under the rules to grant the City's Petition for Writ of Certiorari and yet decline to reach the issue presented in Question No. 1, which the Ninth Circuit resolved against Cross Petitioners.

Nevertheless, Cross Petitioners believe that Question No. 1 is an important question for this Court to resolve and probably could have provided this Court with an independent basis for granting certiorari had this Cross Petition been timely filed. This Court has never dealt with the question of whether a city may retroactively require existing adult businesses to relocate when cities do not require other kinds of non conforming businesses to relocate. Moreover, independent of the equal protection claim herein, Cross Petitioners submit that it is a violation of the First Amendment to require existing businesses to move given the sensitive nature of the First Amendment interest involved. It is one thing to move a hardware store or a fish market. It is quite another thing to have to relocate

an adult business, given all the difficulties that relocation requires. For an example of such difficulties one need not look further than the Ninth Circuit's decision in Young v. City of Simi Valley, 216 F.3d 807 (9th Cir. 2000), where the city made the prospective business operator in that case go through almost a year of hoops, only to deny the proposed adult cabaret permit when a Bible study class obtained an over the counter zoning clearance at the last moment to "veto" the application submitted by Mr. Young, who had been seeking for a long time to open and operate an adult business in the City of Simi Valley. The facts set forth in Young v. City of Simi Valley, supra, are not unique. Similar horror stories can be told by other prospective adult businesses seeking to open in particular cities.

The City of Simi Valley has petitioned this Court for Certiorari in Young v. City of Simi Valley, supra. See City of Simi Valley v. Young, No. 00-701.

This Court should take up the issue of the compelled relocation of existing adult businesses because this Court has never decided such a case before. This case, therefore, does present this Court with the unique opportunity to further clarify a muddled area of the law.

The problem was first created by this Court's narrow 5 to 4 decision in Young v. American Mini Theaters, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) when this Court first dealt with the question of whether or not cities have the power to adopt adult zoning ordinances. While Cross Petitioners believe that the four dissenters had it right - that the ordinance was facially invalid - Justice Stevens' opinion for the Court, while

upholding the facial validity of the ordinance in question, expressly noted that the ordinance in question did not cover existing businesses. Specifically, Justice Stevens stated in footnote 35:

> "The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight.'"

We have come a long way since this Court's 5 to 4 decision in Young v. American Mini Theaters. Lower courts have begun to apply ordinances to existing businesses in a way that suppresses or greatly restricts freedom of speech. Adult bookstores and theaters are becoming endangered species in the United States as cities relentlessly move forward to get rid of erotic books and magazines. Ironically, these adult bookstores and theaters expressly and vigorously prohibit minors from entering, unlike general retail stores that do not have similar

restrictions. It is indeed ironic that a business totally devoted to erotic material which keeps out minors is eliminated while stores open to the public (including minors) that sell general merchandise and have an adult section are allowed to operate. In any event, this Court's more recent decision in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) likewise did not deal with the issue presented by this Cross Petition because it dealt with the attempt by a prospective new adult theater to establish itself in a city. In the context of that case this Court reversed the Ninth Circuit and concluded that there was ample room for the operation of the prospective adult theater. This Court noted that unlike most ordinances, including the ordinance in the instant case, the City of Renton did not prohibit the operation of one adult business near another one. Therefore, there was an ample opportunity, this Court said, for the operation of adult businesses in the particular area set aside by the City for that purpose. Moreover, as emphasized herein, City of Renton v. Playtime Theaters, Inc., was not a relocation case.

This case, therefore, presents this Court with the opportunity to formulate principles to apply to relocation cases as opposed to new entry cases.

Cities have other tools available to them to deal with the isolated case where a particular adult business might be considered a nuisance. State laws dealing with nuisance and abatement may be utilized. It is not necessary, nor is it constitutionally permissible to zone out existing adult bookstores.

CONCLUSION

For the foregoing reasons, Cross Petitioners respectfully request this Honorable Court to grant their Conditional Cross Petition should this Court grant the Petition submitted by the City of Long Beach.

Respectfully submitted,

ROGER JON DIAMOND

Attorney for Cross Petitioners